Memorandum Opinion

UNITED STATES DISTRICT COURT

Southern District of New York

80 Civ. 1577

Maria Moe, Raoul Roe, and Ricardo Roe, an infant, by his father Raoul Roe, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

David Dinkins, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and David Axelrod, individually and as New York State Commissioner of Health,

Defendants.

Appearances

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CONSTANCE BAKER MOTLEY, D. J.

Defendants have moved for an order, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the complaint. Plaintiffs have moved for an order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining that this action may be maintained as a class action with a plaintiff and a defendant class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. For the reasons stated below, the court concludes that the complaint should be dismissed without prejudice, since abstention is mandatory in this action.

Plaintiffs in this action seek a judgment declaring unconstitutional, and enjoining enforcement of, the parental consent requirements of New York Domestic Relations Law §§ 15.2 & 15.3. Under New York law, all persons who in-

tend to be married in the state of New York must obtain a marriage license from a town or city clerk in the state. N.Y. Dom. Rel. Law § 13. Section 15.2 provides that if it appears that the male applicant for a marriage license is under eighteen years of age and is not under sixteen years of age, or that the female applicant is under the age of eighteen years and is not under fourteen years of age, "then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardian or guardians of such minor or minors." Section 15.2 further requires that "[t]he parents, guardians or other persons whose consent it shall be necessary to obtain and file with the town or city clerk before the license shall issue shall personally appear and acknowledge or execute the same before the town or city clerk, or some other officer authorized to administer oaths and take acknowledgments." Section 15.3 provides that if it appears that the female applicant is under the age of sixteen years, the town or city clerk shall require, in addition to the consents provided in Section 15.2, the written approval and consent of a justice of the supreme court or of a judge of the family court. Section 15.3 further provides that any town or city clerk who issues a marriage license without first requiring the approval and consents provided for by Sections 15.2 and 15.3 shall be guilty of a misdemeanor.

Plaintiffs allege that the New York statute requires parental consent to the marriage of minors, in violation of plaintiffs' rights under the First, Fifth, Ninth, and Four-

teenth Amendments to the United States Constitution. In particular, plaintiffs allege that the statute constitutes an absolute veto power over the decision to marry of minors and their prospective spouses, without establishing any standard for the withholding of consent by parents. Plaintiffs allege, moreover, that the statute prevents those minors and their prospective spouses with children from establishing legitimate parent-child relationships through marriage.

Defendants argue that the *Pullman* doctrine of abstention requires dismissal of plaintiffs' complaint. The Second Circuit summarized the standards of the *Pullman* doctrine in *Winters* v. *Lavine*, 574 F.2d 46, 69 (2d Cir. 1978):

> While a litigant wishing to vindicate his federal constitutional rights has a "right to have [those claims] adjudicated by a federal tribunal," *McRedmond* v. *Wilson*, 533 F.2d 757, 760 (2d Cir. 1976), it is equally well-understood that a federal court presented with such claims will under certain circumstances have a duty to postpone consideration of the federal constitutional claims until the state courts have had an opportunity to consider other issues inherent in the lawsuit. The seminal case in the area is *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). "There [, the Supreme] Court held that in special circumstances, where resolution of a federal constitutional issue is controlled by the interpretation of an unclear or complex state statute that is susceptible to a construction which would avoid or modify the necessity of a constitutional adjudication, the federal court should defer to the state court's interpretation of its own statute." *McRedmond* v. *Wilson*, *supra*, 533 F.2d at 760. We have recognized that the significant policies which are advanced by application of the *Pullman* doctrine are "the avoidance of federal-

> state friction, the recognition that regardless of a federal court's construction, the state's highest court is the final expositor of that state's law, and the possibility that the federal [constitutional] question may be avoided." *Id.* at 761. The cases in which application of the *Pullman* doctrine is appropriate are those in which these formidable policy factors "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *Id.* We also explained in *McRedmond* that there are "three essential conditions for invocation of the doctrine of abstention [: (1)] that the state statute be unclear or the issue of state law be uncertain, [(2)] that resolution of the federal issue depend upon the interpretation to be given to the state law, and [(3)] that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue." *Id.* (citations omitted).

Accord, Pharmaceutical Society of the State of New York, Inc. v. *Lefkowitz*, 586 F.2d 953, 955-56 (2d Cir. 1978). *See generally Reid* v. *Board of Education*, 453 F.2d 228, 240-42 (2d Cir. 1971). *See also Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention").

In the case at hand, the court must first consider whether Sections 15.2 and 15.3 are unclear. Plaintiffs argue that Sections 15.2 and 15.3 are clear and unambiguous, and that under state law the two sections must be read: 1) as failing to provide a standard for the granting or withholding of parental consent, and 2) as providing that the parental consent requirement cannot be dispensed with. Plaintiffs assert that Sections 15.2 and 15.3 have been definitively interpreted in a number of state cases. A close analysis of

the cases relied upon by plaintiffs, however, suggests that these cases are far from "a definitive exposition of state law." *Connecticut State Federation of Teachers* v. *Board of Education Members*, 538 F.2d 471, 485 (2d Cir. 1976).

Thus, for example, in *Carr* v. *Carr*, 104 N.Y.S.2d 269 (Sup. Ct. Chautauqua County 1951), a state court examined the validity of a Michigan marriage by a male of the age of twenty years. In dictum, the court indicated that under Section 15, which then applied to males under twenty-one years of age, the consent of parents was a prerequisite to a valid marriage, if performed in the state of New York. *Id.* at 270, 271. In a more recent case, *Berger* v. *Adornato*, 76 Misc. 2d 122 (Sup. Ct. Onondaga County 1973), a state court held that Section 15.2, as it was then written, violated the Equal Protection Clause of the Fourteenth Amendment because it established a different age standard for marriage between males and females. In ruling the statute unconstitutional as applied to the twenty-old male petitioner, the court characterized Section 15.2 in dicta:

> There are no safeguards, guidelines, limitations or assurances that the parents will perform their responsibility within the framework of the allegedly valid State objective. There is no provision for judicial review, since the authority of the parents is unrestricted and therefore, final.
>
> Thus, the parents may use their authority to act on behalf of the State interest. Or they may do whatever they please. . . .

Id. at 124. Finally, in *In re Powers*, 96 Misc. 2d 183 (Fam. Ct. Yates County 1978), a state Family Court considered a petition seeking the court's review of a parent's refusal to consent, or seeking to dispense with the written parental

consent requirement. The court dismissed the petition on the ground that the Family Court lacked subject matter jurisdiction:

> As to the mother's refusal to give her written consent to license the marriage of her 17-year-old son, even were it shown to be unreasonably withheld or refused, the Family Court has no subject matter jurisdiction to review a parent's refusal or to dispense with the written parental consent required by the statute before a town or city clerk may issue a marriage license to a person under 18 years of age.

Id. at 184.

The court is of the view that these state cases leave Sections 15.2 and 15.3 unclear for a number of reasons. With respect to the *Carr* and *Berger* cases, the state court's discussions of whether the parental consent requirement can be dispensed with and whether a parent's refusal is final and not subject to judicial review were clearly dicta. In both cases the lower state courts were presented with issues which did not require an analysis of possible exceptions or qualifications to the parental consent requirement. With respect to the *Powers* case, it is clear that the Family Court simply found that it lacked subject matter jurisdiction. The *Powers* court carefully refrained from suggesting that other state courts would lack subject matter jurisdiction—that is, the Family Court in *Powers* did not indicate that a parent's refusal was unreviewable by all courts or that Sections 15.2 and 15.3 precluded all courts from dispensing with the written parental consent requirement. *See also Connecticut State Federation of Teachers v. Board of Education Members, supra*, 538 F.2d at 485 (effect of state lower court decisions).

It should be noted, moreover, that the *Carr*, *Berger*, and *Powers* opinions, insofar as they discuss the reviewability of and exceptions to parental consent under Sections 15.2 and 15.3, preceded the Supreme Court's decision in *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979). In light of the Court's opinions in *Bellotti*, it is quite possible that a state court would interpret Sections 15.2 and 15.3 differently from the interpretations given in *Carr*, *Berger*, and *Powers*.

In *Bellotti*, Justice Powell concluded, in an opinion joined by three other Justices, that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 813 [footnote omitted]. The analogy between *Bellotti* and the case at hand is too obvious to be ignored. While the Justice Powell opinion in *Bellotti* at one point does appear to hint at a distinction between marriage and abortion, it cannot be said that *Bellotti's* requirement of an alternative procedure is wholly inapplicable to the case at hand. Accordingly, a state court faced today with the task of interpreting Sections 15.2 and 15.3 might choose, not unreasonably, to interpret these sections as implicitly providing an alternative procedure.

In summary, Sections 15.2 and 15.3 are unclear in a number of respects. The statute may be interpreted by the state courts as implicitly providing a standard for the granting or withholding of parental consent, and as implicitly allowing an alternative procedure for judicial review of a withholding of consent. The statute may also be interpreted as implicitly allowing a court to dispense with the parental consent requirement under certain circumstances. While the language of Sections 15.2 and 15.3

makes no explicit reference to judicial review or dispensation with the consent requirement, the absence of such references will not itself render the sections clear and unambiguous. As discussed above, the state courts which have considered Sections 15.2 and 15.3 have not yet squarely addressed the issues of interpretation presented in the case at hand.

Next, the court must examine whether the resolution of the constitutional issues depends upon the interpretation to be given to the state law. While plaintiffs have raised a number of constitutional theories in their challenge to Sections 15.2 and 15.3, two theories in particular are critical to an analysis of the abstention question. First, a resolution of the constitutional issues would require the court to apply the Supreme Court's decision in *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), to the case at hand. In *Zablocki*, the Court held that when a statutory classification significantly interferes with the exercise of a fundamental right, such as the right to marry, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *Id.* at 388. In the case at hand, it is beyond dispute that Sections 15.2 and 15.3 significantly interfere with the exercise of plaintiffs' right to marry. The critical question is, thus, whether these sections are supported by sufficiently important state interests and is closely tailored to effectuate those interests. This inquiry, in turn, depends upon whether Sections 15.2 and 15.3 require parental consent in all instances, and whether a parent's authority to withhold consent is absolute and not subject to judicial review. Obviously, the interpretation to be given Sections 15.2 and 15.3 will effect the court's deter-

mination of whether the provisions are closely tailored to effectuate only sufficiently important state interests.

Second, a resolution of the constitutional issues would require the court to apply the Supreme Court's decisions in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979), to the case at hand. In *Danforth*, the Court held that the State may not impose a blanket provision requiring the consent of a parent as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. 428 U.S. at 74. Thus it is inappropriate to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent. *Id.* In *Bellotti*, Justice Powell relied upon *Danforth* in concluding that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. 61 L.Ed 2d at 813. In such a proceeding a minor is entitled to show that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes. *Id.* at 813-14. "In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*." *Id.* at 814. To the extent, then, that *Danforth* and *Bellotti* may be relevant to the case at hand, the resolution of the constitutional issues depends upon whether Sections 15.2 and 15.3 are interpreted as giving parents an absolute, and possibly arbitrary, veto over a minor's decision to marry.

In short, resolution of both constitutional theories discussed above depends upon the interpretation to be given to Sections 15.2 and 15.3.

Finally, the court must examine whether Sections 15.2 and 15.3 are susceptible of an interpretation that would avoid or modify the federal constitutional issue. The court is of the view that Sections 15.2 and 15.3 are susceptible of an interpretation that would modify the federal constitutional issue. In particular, the court agrees with defendants that the provisions are susceptible to one or more interpretations that would modify the federal constitutional issues. First, Sections 15.2 and 15.3 may be interpreted as implicity providing an exception for minors who have emancipated themselves or who have otherwise shown mature judgment. Such an interpretation would be consistent with "emancipated minor" exceptions in a variety of areas of New York law. *See generally* Report of the Law Revision Commission for 1980, 1980 Leg. Doc. No. 65, at A-42 to A-46. A plausible interpretation of Sections 15.2 and 15.3 is that "emancipated minors" may seek judicial relief from the parental consent requirement. Second, Sections 15.2 and 15.3 may be interpreted as requiring that a parent's granting or withholding of consent be based on the child's best interests. Accordingly, Sections 15.2 and 15.3 may be interpreted as allowing a minor to have a state court review a parent's withholding of consent where the parent's decision is in bad faith or contrary to the child's best interest. In such circumstances, a court could decide, upon consideration of the circumstances and the minor's maturity, to dispense with the parental consent requirement.

Of course, the court expresses no view as to the proper interpretation of Sections 15.2 and 15.3. The court merely

notes that the above interpretations would not be unreasonable or necessarily contrary to the language of the statute. Sections 15.2 and 15.3 have been construed in some respects, but not in those respects critical to this court's constitutional inquiry.

In summary, the court concludes that the three essential conditions for invocation of the doctrine of abstention are met in the case at hand. The policy factors advanced by application of the *Pullman* doctrine here "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *McRedmond* v. *Wilson*, *supra*, 533 F.2d at 761. While New York unfortunately does not have a certification procedure for expedited resolution of these issues of interpretation of New York law, this fact alone does not preclude invocation of the doctrine of abstention. While plaintiffs must bring a state declaratory judgment proceeding or a proceeding under Article 78 of the New York Civil Practice Law and Rules, as well as appropriate appeals if necessary, it may safely be assumed that the state courts will proceed promptly in a case raising such important issues as the case at hand.

Plaintiffs have suggested that they have no state remedies by which to seek an interpretation or review of Sections 15.2 and 15.3. This argument is without support. Plaintiffs may bring a proceeding under Article 78 of the Civil Practice Law and Rules. On applying for a license and being refused, plaintiffs may seek a writ of mandamus under Article 78 against the Clerk of New York City. If the state court finds relief to be appropriate, it may order that a marriage license be issued by the city clerk. *See Berger* v. *Adornato*, *supra*. *See also Friedrich* v. *Katz*, 73

Misc. 2d 663 (Sup. Ct. N.Y. County 1973). While plaintiffs in the case at hand do not intend to challenge the constitutionality of Sections 15.2 and 15.3 in the state courts, it should be noted that under New York law an Article 78 proceeding may not be used to test the constitutionality of a legislative enactment as distinct from the counstitutionality of its application. *Board of Eduction* v. *Gootnick*, 49 N.Y.2d 683 (1980). Should a state court find the case at hand to be inappropriate under Article 78, the matter may be converted to a declaratory judgment action. *See id.* In any case, state remedies are available for plaintiffs to seek an interpretation of Sections 15.2 and 15.3 and, if they so choose, to challenge the constitutionality of the provisions and obtain appropriate relief.

The final issue before the court is the proper disposition of this action, given the court's decision that abstention is appropriate. It is well-established that while a party must inform the state courts what his federal claims are, so that the state statute may be construed "in light of" those claims, a party is not compelled to litigate his federal claims in the state courts. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420 (1964). Plaintiffs have informed the court of their intention to preserve their right to litigate their federal claims fully in the federal courts.

As a general rule, it is better practice to retain jurisdiction rather than to dismiss in abstention cases. *Zwicker* v. *Koota*, 389 U.S. 241, 244 n.4 (1967). However, the Supreme Court has made clear that it is not improper to dismiss on grounds of abstention, provided that the dismissal is without prejudice to the right of the plaintiffs to

litigate their federal claims in federal court at the conclusion of the state proceedings. *American Trial Lawyers Assoc. v. New Jersey Supreme Court*, 409 U.S. 467 (1973); *see Yesterday's Children v. Kennedy*, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

In the case at hand, the court is of the view that it is slightly preferable for the court to dismiss the action without prejudice to the right of the plaintiffs to litigate their federal claims in federal court at the conclusion of the state proceedings, rather than retaining jurisdiction. Despite plaintiffs' intention to preserve their right to litigate their federal claims fully in federal court, there is a serious possibility that plaintiffs will receive full relief in the state courts. Accordingly, dismissal without prejudice appears to be the preferable course in terms of judicial economy.

For the reasons stated above, the court concludes that defendants' motions to dismiss the complaint, without prejudice, must be granted. The court reaches this conclusion solely on the grounds of abstention, without considering defendants' other arguments for dismissal. The court need not determine whether this action may be maintained as a class action.

Dated: New York, New York
July 10, 1980

So Ordered.

Constance Baker Motley
U. S. D. J.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT J. SCHACK , being duly sworn, deposes and says that he is an Asst. Atty. Gen. in the office of the Attorney General of the State of New York, attorney for Respondent Axelrod herein. On the 28th day of May , 1982, he served the annexed upon the following named person :

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Attorneys in the within entitled proceeding By depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address es within the State designated by them for that purpose.

Robert J. Schack
ROBERT J. SCHACK

Sworn to before me this
28th day of May , 1982

Assistant Attorney General
of the State of New York